LEONG SIONG SUN & ANOR.

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, SEREMBAN
PEH SWEE CHIN J
[CRIMINAL APPEAL NO. 10 OF 1982]
11 JULY 1985

CRIMINAL LAW AND PROCEDURE: *Appeal against conviction by learned President - Appellants convicted under s. 304 Penal Code - Medical evidence relating to the deceased in question - Death caused by rupture of intestine with peritonitis - Deceased had left hospital on his own accord without adequate treatment - Whether appellants could be convicted under s. 304 as opposed to merely causing grievous bodily harm - Whether the second cause leading to death of deceased was so overwhelming as to make the original cause of death part of the history.*

The two appellants were convicted under s. 304 of the Penal Code for having caused the death of one Kim Yong with the intention of causing such bodily injuries as was likely to cause death. The medical evidence showed that the deceased died of rupture of the intestine with peritonitis. The appellants were convicted by the learned President.

On appeal it was argued that the death was not caused by the rupture inflicted by the appellants but by the failure for the deceased to be treated properly and the deceased's own negligence in discharging himself thereby foregoing the required operation. The medical testimony showed that if treated adequately and on time, the rupture would not have been fatal. In such circumstances the issue raised was whether the appellants could be convicted under s. 304 instead of having merely caused grievous bodily harm.

Held:

[1] In circumstances of this nature, the test would be whether at the time of death the original wound was still an operating cause and a substantial cause, albeit that some other cause of death was also operating. (*R. v. Smith* [1959] 2 All ER 193).

[2] In the present case it could not be said that the rupture of the intestine was not the operating and substantial cause of death, nor could it be said that the failure to operate on the deceased was so overwhelming a cause of death as to make the rupture of the intestine merely a part of the history.

[Appeal dismissed.]

Case referred to:
R. v. Smith [1959] 2 All ER 193

Legislation referred to:
Penal Code, s. 304

For the appellants - Manjeet Singh Dhillon; M/s. Lawrence, Dhillon & Associates
For the public prosecutor - Mohd. Zaki bin Md. Yasin; DPP

JUDGMENT

Peh Swee Chin J:

The only matter in this criminal appeal which has caused some difficulty is about medical evidence relating to the deceased concerned herein.

The two appellants were convicted by the Seremban Sessions Court on a charge of causing the death of one "KIM YONG" with the intention of causing such bodily injuries as was likely to cause death under s. 304 of the Penal Code and were sentenced to 3½ years' and 2 years' imprisonment respectively. I find ample support from the evidence for the findings of fact of the learned President that the appellants had, in furtherance of the common intention of all of them, caused the death of the said deceased with the intention of causing such bodily injuries as was likely to cause death and in particular, the specific factual finding that it was 1st appellant who alone delivered the blows on the said deceased who died of rupture of the intestine with peritonitis, as found in a post-mortem examination.

The deceased was attended to at some clinic of the estate after the injury was inflicted on him, and was admitted to District Hospital, Kuala Pilah where a doctor, (PW4), on admission, found a lacerated wound on the arm with tenderness or swelling all over the abdomen. She said that X-ray would normally be ordered on such a patient, and if necessary, operated on. The deceased was admitted on 17 February 1981 and discharged on 19 February 1981. According to another doctor, (PW3), at the same hospital who performed the post-mortem examination, the deceased left the hospital of his own accord and that the deceased was treated but not operated on. There was an infection. If treated adequately, properly and on time, the rupture of the intestine would not have been fatal.

The deceased had died of peritonitis, i.e. the infection and inflammation of the membrane which lines the cavity of the abdomen, brought about undoubtedly by the rupture of the intestine which was obviously not treated by surgery. In these circumstances, could the appellants be convicted of causing the death of the deceased as opposed to merely causing grievous bodily harm to him? Learned Counsel has submitted for the appellants that the cause of death of the deceased was the failure for the deceased to be treated properly and the deceased's own negligence in discharging himself. I am fairly certain that if the deceased had been told that if he discharged himself without surgery to repair the rupture of the intestine he would have faced a very likely death, the deceased would have practically begged for the surgery and discarded any intention to discharge himself from the hospital.

To revert to learned Counsel's submission that the cause of death was the failure on the part of the deceased to be treated properly, the case of *R.v. Smith* [1959] 2 All ER 193, is pertinent. In that case, the accused, a soldier, was convicted of murder of a fellow soldier, and the Courts-Martial Appeal Court, comprising of Lord Parker CJ and two other Judges, dismissed the appeal. The appellant there had complained that the wounded soldier who died later was not adequately and correctly and promptly treated by the army medical officer who had applied artificial respiration, which it was found, would have impeded the chances of healing, and further the blood transfusion which was the best treatment, was not available at the place where the deceased was treated. In the course of judgment, Lord Parker CJ laid down a test as follows when he said:

> It seems to the Court that, if at the time of death the original wound is still an operating cause and a substantial cause, then the death can properly be said to be the result of the wound, albeit that some other cause of death is also operating. Only if it can be said that the original wounding is merely the setting in which another cause operates can it be said that the death does not result from the wound. Putting it in another way, only if the second cause is so overwhelming as to make the original wound merely part of the history can it be said that the death does not flow from the wound.

Here in this case I am unable to say that the rupture of the intestine was not the operating and substantial cause of death, neither am I able to say that the failure to operate on the deceased was so overwhelming a cause of death as to make the rupture of the intestine merely a part of the history.

I therefore decline to accept Counsel's submission on this and having regard to what has been stated on the other findings of the learned President, I would dismiss the appeal and confirm the convictions recorded and sentences passed by him.

Also found at [1985] 2 CLJ 250